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In The

Supreme Court of the United States

October Term, 1998

KAREN SUTTON and KIMBERLY HINTON,

Petitioners,

v.

UNITED AIR LINES, INC.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF FOR PETITIONERS

VAN AARON HUGHES
Counsel of Record for Petitioners
TUCKER K. TRAUTMAN
KRISTIN L. WETENKAMP
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, Colorado 80202
Telephone: (303) 464-9409

Attorneys for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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QUESTIONS PRESENTED

1. Does the Americans with Disabilities Act protect from discrimination an airline pilot with a severe but correctable vision impairment?

2. Should courts defer to the EEOC Interpretive Guidance that disabilities should be analyzed in their uncorrected state?

3. Is a commercial pilot regarded as disabled by a major airline that refuses to employ her in any pilot position due solely to her poor uncorrected vision?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 130 F.3d 893, and is reproduced in the Joint Appendix ("J.A.") at page 45. The Order of the United States District Court for the District of Colorado is reproduced at J.A. 30.

JURISDICTION

The judgment of the Court of Appeals was entered on November 26, 1997. J.A. 75. Petition for Rehearing and Suggestion for Rehearing En Banc was denied on March 3, 1998. J.A. 76-77. Petitioners filed their Petition for Writ of Certiorari on June 1, 1998. This Court granted the petition on January 8, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTES AND REGULATIONS INVOLVED

Section 3(2) of the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12102 (1994):

(2) Disability. The term "disability" means, with respect to an individual –

(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment.

Section 102(a) of the ADA, 42 U.S.C. § 12112(a) (1994):

(a) General Rule. No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Section 1630.2(j) of the ADA Regulations, 29 C.F.R. § 1630.2(j)(1), (2) (1998):

(j) Substantially limits –

(1) The term "substantially limits" means:

(i) Unable to perform a major life activity that the average person in the general population can perform; or

(ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity.

(2) The following factors should be considered in determining whether an individual is substantially limited in a major life activity:

(i) The nature and severity of the impairment;

(ii) The duration or expected duration of the impairment; and

(iii) The permanent or long term impact, or the expected permanent or long term impact of or resulting from the impairment.

Excerpt, EEOC Interpretive Guidance for § 1630.2(j), 29 C.F.R. pt. 1630, App. § 1630.2(h) & (j), at 347-48 (1998):

(h) The existence of an impairment is to be determined without regard to mitigating measures such as medicines, or assistive or prosthetic devices. *See* Senate Report at 23, House Labor Report at 52, House Judiciary Report at 28. For example, an individual with epilepsy would be considered to have an impairment even if the symptoms of the disorder were completely controlled by medicine. Similarly, an individual with hearing loss would be considered to have an impairment even if the condition were correctable through the use of a hearing aid.

(j) The determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices.

STATEMENT OF THE CASE

As alleged in their Amended Complaint,[1] Petitioners Karen Sutton and Kimberly Hinton ("Pilots"), identical twin sisters, are both experienced commercial airline pilots. J.A. 17, ¶ 1. They have received the requisite licenses and medical certificates from the Federal Aviation Administration ("FAA") to fly any class of passenger airplane. J.A. 17-20, ¶¶ 1, 16.

Pilots' uncorrected vision is severely impaired. Pilots have uncorrected vision of 20/200 or worse in the right eye, and 20/400 or worse in the left eye. J.A. 23-24, ¶ 37(a), (b).[2] Without the use of corrective lenses, Pilots cannot conduct basic activities such as driving an automobile, watching television, or shopping in a public store. J.A. 24, ¶ 37(d). When wearing glasses or contact lenses, however, Pilots' corrected vision is 20/20. J.A. 23, ¶ 36.

Pilots have flown for regional commercial airlines, but it is their life-long goal to fly for a major global air carrier. J.A. 17-19, ¶¶ 1, 13. To that end, in 1992 both applied for pilot positions with Respondent United Air Lines, Inc. ("United").[3] J.A. 20-22, ¶¶ 19, 28. Pilots' credentials and experience far

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[1] Because the district court dismissed this case at the outset pursuant to Fed. R. Civ. P. 12(b)(6), the only facts contained in the record are the allegations of Petitioners' Amended Complaint, J.A. 17-29. In their statement of the case, Petitioners assume all of these allegations to be true.

[2] A person with 20/200 vision can see an object at 20 feet only as well as an unimpaired person could see the same object from 200 feet. J.A. 23-24, ¶ 37(b). The resolving power of an unimpaired person's eye is approximately one minute of arc, which permits recognition of letters occupying five minutes of arc. Thus, a person with 20/200 vision can only distinguish at 20 feet letters so large that they occupy five minutes of arc from 200 feet away. Frank W. Newell, *Ophthalmology Principles and Concepts* 149-50 (8th ed. 1996); Daniel G. Vaughan, et al., *General Ophthalmology* 382 (13th ed. 1992).

[3] Prior to passage of the ADA, United had twice previously rejected Ms. Hinton's applications because of her poor uncorrected vision. J.A. 20, ¶ 18.

exceed United's hiring standards. J.A. 19-20, ¶¶ 14-17.[4] They are qualified to fly for United, with the ability to perform all of the essential job functions. J.A. 23, 26, ¶¶ 35, 40.

Although Pilots' applications disclosed their poor uncorrected vision, J.A. 21-23, ¶¶ 24, 33, United invited Pilots to participate in flight simulator testing and interviews at its Denver Flight Training Center. J.A. 20-22, ¶¶ 19, 28. Pilots went to great efforts to prepare for the interview process, including training sessions and mock interviews with aviation consultants. J.A. 20-22, ¶¶ 21, 30.

When she arrived at United's Flight Training Center, United administered a flight simulator test to Ms. Hinton, on which she performed very well.[5] J.A. 21, ¶ 22. During the interview process, however, Pilots' interviewers informed them that United had made a "terrible, terrible mistake." J.A. 21, ¶ 23. United terminated Pilots' interviews, and rejected their applications, because they did not meet United's uncorrected vision standard for new applicants. J.A. 21-23, ¶¶ 23, 25, 32, 34.

United currently requires new applicants to have uncorrected vision of 20/100 or better. J.A. 25, ¶ 38(e). At one time, United required all of its new pilots to have 20/20 uncorrected vision. United later reduced its requirement to 20/70, then later to 20/100. *Id.* These adjustments were motivated not by any medical evidence, but rather by market forces United faced in competing for qualified candidates. *Id.*

United asserts that its requirement is a rational safety requirement, and believes that Petitioners' uncorrected vision limits their fitness to be hired as pilots. J.A. 24, ¶ 38(a). Yet it has no data or evidence to support this conclusion, or to rebut

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[4] For example, United requires 350 hours flight experience in fixed-wing aircraft as pilot or co-pilot. J.A. 19, ¶ 15. By 1992, Ms. Sutton and Ms. Hinton had compiled over 3,400 hours and 4,700 hours, respectively. J.A. 19-20, ¶ 16.

[5] Because Ms. Sutton's interview was randomly scheduled before the flight simulator test, she never had the opportunity to take the test. J.A. 22-23, ¶ 32.

the FAA's determination that there is no correlation between pilots' uncorrected vision and safety. J.A. 25, ¶¶ 38(b)-(d). Pilots have alleged that the requirement is not based upon any legitimate safety concerns. *Id.* Indeed, Pilots are informed and believe that United applies its vision requirement only to new applicants, not to existing pilots, and that many of United's current pilots have uncorrected vision as poor as or worse than Petitioners'.[6]

United applies its policy to all applicants for any of its thousands of piloting positions throughout the world, without regard to aircraft model, route, or flying conditions. J.A. 25-26, ¶ 38(f), (g). Moreover, there is nothing unique about United's pilot positions that distinguishes them from positions with other airlines. *Id.*

In December of 1992, Pilots timely filed claims of disability discrimination with the Equal Employment Opportunity Commission ("EEOC"). J.A. 18, ¶¶ 3, 6. The EEOC issued a Determination of Probable Violations of the Americans with Disabilities Act in both cases, citing United for requesting disability-related information in a job application, discriminating against qualified individuals on the basis of a disability, and failing to maintain appropriate records. J.A. 26-27, ¶¶ 42, 43. United did not enter into meaningful conciliation efforts with the EEOC, and the Commission issued right-to-sue letters to both Pilots. J.A. 18, 27, ¶¶ 4, 7, 44.

Pilots brought suit against United under Section 3(2) of the Americans With Disabilities Act ("ADA" or "Act"), 42 U.S.C. § 12102(2) (1994). They alleged that United violated the Act by rejecting them because they are disabled, or because United regards them as disabled. Plaintiffs sought legal and equitable relief provided for in the Act, including injunctive relief ordering United not to apply unlawful criteria in future hiring decisions.

The district court granted United's motion to dismiss Pilots' action, holding that Pilots' vision is not a substantially

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[6] Pilots have not yet had the opportunity to conduct discovery to confirm this.

limiting impairment within the meaning of the ADA. The court of appeals affirmed. The court of appeals concluded that Pilots are impaired in the major life activity of seeing, but that they are not substantially limited in seeing when the effect of corrective lenses is taken into account. The court expressly acknowledged that its holding was directly contrary to interpretive guidelines of the EEOC and to decisions of the Eighth, Ninth, and Eleventh Circuits. J.A. 62 n.7. The court also held that Pilots had not stated a claim that United regarded them as disabled in the major life activity of working. The court found the relevant class of jobs to be all pilot positions at all airlines, J.A. 71-72, and concluded that United did not regard Pilots as disabled as to this class of jobs, given that Pilots were able to obtain work elsewhere in this class. J.A. 72-73.

SUMMARY OF ARGUMENT

The Tenth Circuit's decision should be reversed for two independent reasons. Pilots are actually disabled within the meaning of the ADA, 42 U.S.C. §§ 12101-12213 (1994), and United regarded Pilots as disabled.

Every available method of statutory interpretation confirms the majority view among the courts of appeals that whether an individual is disabled should be determined without regard to available corrective measures. While the language of the ADA does not directly address this specific issue, it does support the majority view. The inability to perform a major life activity without the aid of corrective medications or devices is a substantial limitation.

The EEOC has so construed the statute in its Interpretive Guidance. Because the EEOC's construction was announced contemporaneously with the statute, at Congress' express instructions, in accordance with the Administrative Procedure Act, it is entitled to the highest level of deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In the alternative, the Commission's view constitutes an interpretation of its own regulations and should be followed unless plainly erroneous.

The legislative history of the ADA speaks directly to the corrective measures issue, and demonstrates Congress' intention that corrective measures not be considered. Congress also implicitly approved this view by incorporating into the ADA language from the Rehabilitation Act that courts had consistently interpreted to permit a claim without regard to whether an impairment is correctable.

This approach also best effectuates the policies underlying Title I of the ADA, by protecting from discrimination employees with a substantially limiting impairment that does not prevent them from performing the work they seek. In contrast, the lower court's view would remove from the scope of the statute a broad class of persons Congress plainly intended to protect, and would embroil courts in dictating to disabled persons nationwide what steps they must take to attempt to correct their impairments.

The rule against consideration of corrective measures squarely applies to the circumstance of severe but correctable myopia. This condition is shared by only a small percentage of Americans. There is no principled or practical reason why the ADA should protect those who employ hearing aids, medication, prosthetic devices, and the like, but subject persons with severe but correctable myopia to continued discrimination.

Even if severe but correctable myopia is not a disability, United regarded Pilots as disabled in rejecting them from employment based upon a false perception of their abilities. Because United refused to consider Pilots for any of its flying positions, and because United's pilot positions are indistinguishable from those of other airlines, United treated Pilots as unfit to work within the entire relevant class of jobs.

ARGUMENT

There is no dispute that United excluded Pilots from employment on the basis of their poor uncorrected vision. United's defense of the merits of its policy raises an important issue, whether Pilots' employment would pose a direct threat to the safety of others. *See* 42 U.S.C. § 12113(b)

(1994); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2) (1998). Pilots allege that there is no safety justification, as evidenced by the FAA's conclusions[7] and by United's continued employment of existing pilots with vision equal to or worse than Petitioners'.[8] Pilots' allegation is assumed true for purposes of evaluating the sufficiency of their pleadings. *Board of County Comm'rs, Wabaunsee County, Kan. v. Umbehr*, 518 U.S. 668, 116 S. Ct. 2342, 2371-72 (1996) (Scalia, J., dissenting) (quoting *Berkovitz v. United States*, 486 U.S. 531, 540 (1988)). While both lower courts made reference to safety concerns, J.A. 42-43, 74, neither reached the direct threat question,[9] and the issue is not ripe for determination by this Court. *See Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 2210 (1998) (ADA "risk assessment must be based on medical or other objective evidence"); *School Bd. of Nassau County, Fla. v. Arline*, 480 U.S. 273, 287 (1987) (evaluation of health and safety risks requires an individualized inquiry and appropriate findings of fact).

Thus, the only issue before this Court is the threshold inquiry of whether Pilots are disabled within the meaning of the ADA. United contends that the ADA does not protect Pilots from discrimination because their impairment is correctable and because other employers may not share United's perception that Pilots are unfit to fly commercial aircraft.

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[7] The FAA has determined that "[t]housands of airmen, exercising airline transport pilot, commercial pilot, private pilot, student pilot and air traffic control tower operator certificates have demonstrated their ability to safely perform their jobs while using corrective lenses for distant visual acuity that is poorer than 20/100 in each eye. . . . The FAA has found through experience that safety is not adversely affected by permitting medical certification at any level of uncorrected acuity." 59 Fed. Reg. 53226, 53231-32 (1994).

[8] Pilots believe the policy furthers no purpose other than to screen United's large number of new applicants and possibly reduce its health insurance costs.

[9] The court of appeals even acknowledged that Pilots' allegations sufficiently establish that they are "qualified" for the position of commercial airline pilot. J.A. 51.

Both arguments are mistaken. Pilots are actually disabled within the meaning of the ADA, and even if they were not, United regarded them as disabled. United may not discriminate against Pilots on the basis of an actual or perceived disability that does not prevent them from performing the job.

I. PILOTS ARE ACTUALLY DISABLED IN THE MAJOR LIFE ACTIVITY OF SEEING.

Title I of the ADA prohibits United from discriminating against a qualified person with a disability because of that disability. 42 U.S.C. § 12112(a) (1994). In this context, an actual disability is "a physical or mental impairment that substantially limits one or more . . . major life activities." 42 U.S.C. § 12102(2) (1994).[10] The court of appeals below held that Pilots' poor uncorrected vision is an impairment of the major life activity of seeing. J.A. 57-58. The court also determined that Pilots' "uncorrected vision would undoubtedly 'substantially limit' their major life activity of seeing." J.A. 65. It then applied the "substantially limited" requirement incorrectly, however, holding that Pilots are not substantially limited in seeing because their vision impairment may be mitigated with corrective lenses. J.A. 65-66. Contrary to the view of the court below, whether an impairment is substantially limiting should be determined without regard to corrective measures. There is no valid reason to exempt vision impairments from this general rule. The ADA protects from discrimination persons with vision impairments sufficiently severe to constitute a substantial limitation in the uncorrected state,[11] without regard to the effect of corrective lenses.

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[10] The term "substantially limits" is not defined in the Act. *See* Comment, *The Americans with Disabilities Act: Great Progress, Great Potential*, 109 Harv. L. Rev. 1602, 1615 (1996) (noting Act's repeated use of ambiguous, undefined terms).

[11] Pilots do not argue that the use of corrective lenses in itself demonstrates a substantially limiting impairment. Use of corrective lenses does not prove or disprove that their wearer is disabled.

A. Courts Should Determine Whether An Impairment Is Substantially Limiting Without Regard To Corrective Measures.

This case affords the Court the opportunity to expressly approve the majority rule that impaired persons do not forfeit the protections of the ADA by using medication or other ameliorative devices to correct their impairments. The Court has approached, but not yet squarely decided, this issue. In a recent decision under the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (1994),[12] this Court implicitly assumed that a disability can be substantially limiting even though corrected by ongoing treatment. *Lane v. Pena*, 518 U.S. 187 (1996) (assuming insulin-dependent diabetes to be a handicap, but deciding against plaintiff on grounds of sovereign immunity); *see also id.* at 200-01 ("The relevant facts are undisputed. The Department of Transportation violated § 504 by separating petitioner Lane from the Merchant Marine academy because he has diabetes.") (Stevens, J., dissenting).[13] In its leading decision to date interpreting the ADA, the Court expressly reserved judgment on whether the substantiality of an impairment should be assessed without regard to mitigating measures. *Bragdon*, 118 S. Ct. at 2206.

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[12] Because Congress adopted the ADA's definition of a "disability" verbatim from the definition of "handicap" under the Rehabilitation Act, courts have frequently considered case law under the latter act relevant to interpreting the ADA. *E.g.*, *Andrews v. State of Ohio*, 104 F.3d 803, 807 (6th Cir. 1997); *but see Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470 n.9 (5th Cir. 1998) (holding that restrictive judicial interpretations of the Rehabilitation Act are not controlling under ADA).

[13] Although not clear from this Court's opinion, it is readily apparent from the district court's recital of the facts that, in the corrected state, the plaintiff's condition was not substantially limiting. *Lane v. Pena*, 867 F. Supp. 1050, 1055 (D.D.C. 1994) (quoting doctor's conclusion that plaintiff's diabetes was under "extremely good control" and observing that the condition did not prevent plaintiff from achieving good grades at the Merchant Marine Academy, as well as rowing crew and participating in other sea-going activities).

A clear majority of the lower courts, including the First, Third, Seventh, Eighth, Ninth, and Eleventh Circuits, have held that courts must determine the existence of a disability without regard to corrective measures. *Arnold v. United Parcel Serv., Inc.*, 136 F.3d 854, 857-63 (1st Cir. 1998); *Matczak v. Frankford Candy and Chocolate Co.*, 136 F.3d 933, 937 (3d Cir. 1997); *Roth v. Lutheran Gen. Hosp.*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Doane v. City of Omaha*, 115 F.3d 624, 627 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 693 (1998); *Holihan v. Lucky Stores, Inc.*, 87 F.3d 362, 366 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1349 (1997); *Harris v. H&W Contracting Co.*, 102 F.3d 516, 519-23 (11th Cir. 1996).[14] Outside of the case at bar, only the Sixth Circuit has apparently held to the contrary. *Gilday v. Mecosta County*, 124 F.3d 760, 766-68 (6th Cir. 1997) (Kennedy, J., dissenting in part, and Guy, J., dissenting in part). The Fifth Circuit has announced an intermediate position, that courts should not consider a corrective measure unless it is a "permanent correction," such as a transplanted organ or artificial joint. *Washington v. HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 470-71 (5th Cir. 1998).[15]

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[14] Both the *Roth* and *Doane* opinions were written specifically in the context of vision impairments, crossed eyes and monocular vision, respectively. None of these leading cases involved the precise issue of severe but correctable myopia. At least two district courts have held that correctable myopia less severe than Pilots' can be a disability under the ADA. *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898 (E.D. Pa. 1997) (rejecting argument that 20/150 uncorrected vision could not be a disability); *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1439 (N.D. Iowa 1996) (finding a genuine issue of material fact whether plaintiff with 20/200 uncorrected vision in both eyes corrected to 20/20 was disabled); *see also Fallacaro v. Richardson*, 965 F. Supp. 87 (D.D.C. 1997) (holding uncorrected vision of 20/600 correctable to 20/20 to be a handicap under the Rehabilitation Act); *but see Joyce v. Suffolk County*, 911 F. Supp. 92 (E.D.N.Y. 1996) (holding that uncorrected vision of 20/200 was not a disability).

[15] The Fifth Circuit had previously suggested, but did not hold, that it would depart from the majority rule. *Ellison v. Software Spectrum, Inc.*, 85

The Tenth Circuit erred in declining to follow the majority rule. It added a requirement to the ADA – that a disability must not be correctable – that does not appear in the language of the statute, is at odds with the EEOC guidance to which courts owe deference, is contrary to the legislative history, reverses the traditional interpretation of the same language in the Rehabilitation Act, negates the purpose of the ADA, and embroils courts in dictating what medications or other means must be employed to correct impairments.

1. The Court Should Defer To The EEOC's Interpretation Of The ADA As Protecting Substantially Impaired Persons Without Regard To Corrective Measures.

While the ADA does not directly address this precise issue, the responsible administrative agency has concluded that the protections of the Act do not turn on the availability of corrective measures. That conclusion is entitled to this Court's deference.

a. The ADA Does Not Directly Address The Precise Question Of Corrective Measures.

If "Congress has not directly spoken to the precise question at issue," the Court should follow a permissible administrative construction of the statute, rather than independently imposing its own interpretation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Here, there is a significant body of agency guidance, legislative history, and case law under both the Rehabilitation Act and the ADA directly on the issue of corrective measures. Crucially, however, the text of the Act does not directly address the precise issue of whether courts should take into account available medication or other corrective measures in determining whether one is disabled.

F.3d 187, 191-92 n.3 (5th Cir. 1996). The court expressly disapproved this *dictum* in *Washington*, 152 F.3d at 469 n.5.

The court below purported to base its decision on the plain language of the ADA; but the Act is silent on the issue of corrective measures. "The language of the statute contains no requirement like the one imposed by the lower cour[t]," that employees must prove that their disabilities cannot be corrected. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley*, 458 U.S. 176, 189 (1982). Indeed, the more faithful reading of the statutory language supports the majority view against consideration of corrective measures. *See* discussion, *infra*, at 30-35. Because the language does not touch on the precise issue before this Court, however, the Court should look first to the responsible agency's construction of the statute.

b. The EEOC Has Instructed Against Consideration of Corrective Measures.

The Equal Employment Opportunity Commission, which is responsible for administering Title I of the ADA, has squarely determined that whether an individual is substantially limited by an impairment is determined without regard to mitigating measures. Contrary to the Tenth Circuit's suggestions, the EEOC has remained consistent in this interpretation of the ADA.

In the ADA, Congress expressly directed the EEOC to issue regulations pursuant to the Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1994) ("APA"), to carry out Title I of the ADA. 42 U.S.C. § 12116 (1994). Exactly one year after the passage of the ADA, the EEOC issued final rules for enforcement of the ADA. Included with those rules was an appendix entitled "Interpretive Guidance." 56 Fed. Reg. 35726, 35739 (1991). The EEOC followed the same notice and comment procedures in promulgating both the text of the final regulations and the Interpretive Guidance. Indeed, the Commission's notice generated over forty comments, totaling in excess of 400 pages, specifically on the issue of corrective measures. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 Harv. C.R.-C.L. L. Rev. 99, 155 n.302 (forthcoming February, 1999).

In its regulations, the EEOC defines the term "substantially limited" to encompass not only one who is unable to perform a major life activity, but also one who is "[s]ignificantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (1998). The Commission clarified its definition of "substantially limited" at length in the attached Interpretive Guidance.

In particular, the EEOC directly ruled that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medication, or assistive or prosthetic devices." 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998). The Commission made the same instruction with respect to the existence of an impairment. 29 C.F.R. pt. 1630, App. § 1630.2(h), at 347 (1998). It is significant that the Commission's conclusion echoes the views of the Department of Justice under Title II of the ADA, 28 C.F.R. pt. 36, App. B, § 36.104, at 583 (1998). *See Bragdon v. Abbott*, 118 S. Ct. at 2209 ("We also draw guidance from the views of the agencies authorized to administer other sections of the ADA.") (citations omitted).

The EEOC explained that the ability to perform a major life activity only with the aid of a mitigating device or medication is itself a substantial limitation:

> [A]n individual who uses artificial legs would . . . be substantially limited in the major life activity of walking because the individual is unable to walk without the aid of prosthetic devices. Similarly, a diabetic who without insulin would lapse into a coma would be substantially limited because the individual cannot perform major life activities without the aid of medication.

29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998). The Commission could hardly have been clearer in its interpretation of its own regulations, and the underlying language of the

statute, as requiring disabilities to be analyzed without regard to corrective measures.[16]

c. The Court Should Defer To The EEOC's Interpretation.

The court below correctly observed that this Court's decision in *Chevron*, *supra*, requires it to defer to the EEOC's interpretation of Title I of the ADA unless "arbitrary, capricious, or manifestly contrary to the statute." J.A. 55 n.3 (quoting *Chevron*, 467 U.S. at 844). The lower court did not, however, afford the same deference to the EEOC's Interpretive Guidance, stating only that it was "entitled to some consideration" but not to "any special deference." *Id.* The court's reasoning is flawed in three respects. First, because the Interpretive Guidance was issued in accordance with the Administrative Procedure Act, contemporaneously with the

[16] The assertion of the court below that the EEOC contradicted this view in two other passages of its guidance, J.A. 64-65, is incorrect. As to the first, the Commission's position on corrective measures is not in any way at odds with its policy of examining the effect of an impairment upon each individual rather than attempting a "laundry list" of disabilities. 29 C.F.R. pt. 1630, App. § 1630.2(j), at 347 (1998). As to the second, there is no inconsistency between the mitigating measures language under the "actually disabled" prong of the ADA, and the Commission's use of a person with "controlled high blood pressure that is not substantially limiting" as an example of an individual "regarded as" disabled. *See* 29 C.F.R. pt. 1630, App. § 1630.2(l), at 350 (1998). Assuming the Commission intended "controlled" to mean "controlled by medication," the phrase suggests that controlled high blood pressure may or may not be substantially limiting, depending upon the severity of the underlying condition (without medication). For its example, the Commission simply postulated a case too mild to be substantially limiting. In contrast, under the Tenth Circuit's view, "controlled" high blood pressure would never be substantially limiting, and the Commission's words "that is not substantially limiting" would be superfluous. If the Commission had intended to employ the Tenth Circuit's approach, it would have so stated and given an appropriate example in its discussion of the "actually disabled" prong.

statute, and pursuant to Congress' express instructions, it is entitled to full *Chevron* deference. Second, the Interpretive Guidance is an interpretation of the EEOC's own rules and therefore should be respected unless clearly erroneous. Third, at a minimum the agency's interpretation is entitled to considerable weight, not merely to "some consideration." Under any of these three levels of deference, the Court should adhere to the policy stated in the EEOC Interpretive Guidance as a reasonable interpretation of the controlling statute and regulations.

This Court has instructed that deference to an agency's construction of the statute it administers is appropriate unless Congress has directly addressed the precise question at issue. *Chevron*, 467 U.S. at 842-43. A court should not impose its own interpretation of the statute, but rather "must sustain the [agency's] approach so long as it is 'based on a permissible construction of the statute.' " *Auer v. Robbins*, 519 U.S. 452, 117 S. Ct. 905, 909 (1997) (quoting *Chevron*, 467 U.S. at 843). Where, as in this case, Congress has expressly delegated authority to an agency to elucidate a provision of the statute, the agency's construction is controlling unless "arbitrary, capricious, or manifestly contrary to the statute." *Chevron*, at 843-44. Alternatively, if Congress has implicitly left an issue to the agency's interpretation, the Court should follow the agency's construction so long as it is a "reasonable interpretation" of the statutory language. *Id.* at 844. This is so even if the Court believes another reading would reflect a more natural or common usage of the statutory language. *EEOC v. Commercial Office Prods. Co.*, 486 U.S. 107, 115 (1988) (citing *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 761 (1979)); *Chevron*, 467 U.S. at 843 n.11.

The *Chevron* rule calls on courts to defer not merely to an administrative agency, but ultimately to Congress, where Congress has seen fit to delegate policy-making authority to a particular agency to fill interpretive gaps in the statutory structure. *Pauley v. Bethenergy Mines, Inc.*, 501 U.S. 680, 696 (1991). Defining the limits of protections afforded by a remedial statute such as the ADA "is often more a question of policy than of law." *Id.* Under the *Chevron* rule, Congress is

well aware that the agency it selects, with its known policy biases, will resolve any ambiguities Congress leaves in statutory language. *AT&T Corp. v. Iowa Utils. Bd.*, 67 U.S.L.W. 4104, 1999 WL 24568, at *14 (January 25, 1999); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 517. Congress delegated that policy-making function under Title I of the ADA to the EEOC, presumably because it deemed that agency best situated to make such judgments. *Cf. Skidmore v. Swift & Co.*, 323 U.S. 134, 139-40 (1944) (instructing that courts should look to an agency's "body of experience and informed judgment").

In *Bragdon v. Abbott*, *supra*, in holding that asymptomatic HIV infection could be a disability under the Act,[17] this Court applied *Chevron* specifically to agency interpretation of the ADA. 118 S. Ct. at 2209. The Court afforded deference to the interpretation of the Justice Department, which administers Title III of the ADA just as the EEOC administers Title I.[18] *See* 42 U.S.C. § 12186(b) (1994). The deference the Court afforded in *Bragdon* is equally appropriate here. *Bragdon*, like this case, turned largely upon the proper interpretation of the term "substantially limits" in the statutory language. While the Court's construction of the language was consistent with the agency's interpretation, the Court did not deem the phrase "substantially limits" to be unambiguous, such that

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[17] Prior to the *Bragdon* opinion, some courts and commentators had argued that HIV cannot be substantially limiting to persons who have not yet begun to experience its most dramatic symptoms. *See, e.g., Runnebaum v. Nationsbank of Md.*, 123 F.2d 156, 170-72 (4th Cir. 1997). The lower court's construction of the phrase "substantially limited" in the present context is strikingly similar to this view, which the Court declined to follow in *Bragdon*.

[18] The Court also gave deference to agency interpretation of the Rehabilitation Act, but did not decide whether full *Chevron* deference was appropriate in light of the fact that Congress had not delegated interpretive authority to a single agency. 118 S. Ct. at 2207. That concern does not apply to Title I of the ADA, which Congress expressly charged the EEOC with administering.

Chevron deference would not apply. In addition, the Court deferred to both the Justice Department's regulations and its technical assistance manual, without making any distinction between the two sources. Because the instant case also presents a question not directly addressed in the text of the ADA, but answered in the relevant agency's regulations and guidelines, the Court should again adhere to *Chevron* and defer to the agency's reasonable interpretation of the Act.

The court below asserted that because the EEOC placed the corrective measures rule in its Interpretive Guidance rather than the text of the regulations, the rule cannot receive *Chevron* deference. This elevates form over substance, abrogating the underlying purposes of the *Chevron* rule. The court below cited *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), for its distinction between regulations and mere interpretive rules. J.A. 55-56 n.3. But the distinction at the heart of the *Chrysler* opinion does not apply here. This Court explained in *Chrysler* that under the terms of the Administrative Procedure Act, an agency must afford interested parties notice of proposed rulemaking and an opportunity to comment in order for the rules it promulgates to acquire the force of law. 5 U.S.C. §§ 553 (1994) (imposing notice requirements), 706(2)(A) (1994) (granting deference to compliant rules). Interpretive rules and other statements of agency policy, procedure, or practice are not subject to these requirements, and thus do not carry the binding effect of law. *Chrysler*, 441 U.S. at 313-15; *Reno v. Koray*, 515 U.S. 50, 61 (1995). The Court did not afford full deference to the regulations at issue in *Chrysler* because they were not issued in compliance with the notice and comment requirements of the APA, but instead "were essentially treated as interpretative rules." 441 U.S. at 315-16.

The situation here is exactly the reverse. The EEOC's guidelines at issue were labeled as interpretive rules, but "were essentially treated as" regulations. The Commission promulgated both its regulations and Interpretive Guidance strictly in compliance with the APA, *Wilson v. Pennsylvania State Police Dept.*, 964 F. Supp. 898, 902-03 n.4 (E.D. Pa. 1997); both are due the same level of deference. *See Bowles v.*

Seminole Rock & Sand Co., 325 U.S. 410, 417 (1945) (deferring to administrative interpretation contained in regulations and concurrently issued bulletin). Under *Chrysler*, deference turns not on what label the agency applies, but rather on compliance with the APA's rulemaking requirements. *See Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 588 (D.C. Cir. 1997) (whether an agency interpretation carries the force of law under the APA depends upon the substance of the interpretation, not on whether the agency calls it an interpretive rule), *cert. denied sub nom. Pollin v. Paralyzed Veterans of Am.*, 118 S. Ct. 1184 (1998).

In addition, the Commission issued its Interpretive Guidance alongside the regulations it enacted pursuant to express congressional instructions. This Court traditionally "has deferred to contemporaneous regulations issued by the agency responsible for implementing a congressional enactment." *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 634 (1984) (following agency regulations under the Rehabilitation Act) (citing *N.L.R.B. v. Bell Aerospace Co. Div. Of Textron, Inc.*, 416 U.S. 267, 274-75 (1974)).[19] The Interpretive Guidance under the ADA is thus not comparable to the EEOC's guidelines under Title VII of the Civil Rights Act of 1964. In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), this Court did not afford deference to those guidelines because "Congress, in enacting Title VII, did not confer upon the EEOC authority to promulgate rules or regulations pursuant to that Title."[20] 429 U.S. at 141 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431 (1975)); *see also Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990) (*Chevron* deference

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[19] The Court in *Darrone* also observed that, as in this case, the agency's interpretation was followed "from the outset," as reflected in the original notice of proposed rulemaking. 465 U.S. at 634 & n.14; *see also EEOC v. Associated Dry Goods*, 449 U.S. 590, 600 n.17 (1981).

[20] In declining to follow the Title VII guideline at issue, the Court found it significant that the guideline was not issued contemporaneously with the statute, and was contrary to the EEOC's earlier position, another administrative agency's view, and the relevant legislative history. 429 U.S. at 142-45. None of those factors is present here.

requires a congressional delegation of administrative authority). This Court's observation in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), that the EEOC's Title VII guidelines are persuasive but not controlling, *id.* at 65 (quoting *General Electric*, 429 U.S. at 141-42), is not applicable to the ADA, which Congress expressly directed the EEOC to administer. 42 U.S.C. § 12116 (1994).

Even if *Chevron* did not apply, the lower court's conclusion that the agency's guidance should not receive any special deference would still be incorrect. If the Interpretive Guidance may not be deemed part of the EEOC regulations, at a minimum it constitutes the EEOC's interpretation of its own regulations.[21] Rendering authoritative interpretations of an agency's own regulations is a "necessary adjunct" of an agency's power to promulgate and enforce those regulations. *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 151-52 (1991) (explaining that applying its own regulations calls upon "the agency's unique expertise and policymaking prerogatives") (citing *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 566, 568 (1980)). The Court therefore adheres to an agency's interpretation of its own regulations, so long as it is "neither 'plainly erroneous [n]or inconsistent with the regulation.' " *Thomas Jefferson University v. Shalala*, 512 U.S. 504, 513 (1994) (quoting *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965)). This "substantial deference," *id.* at 512, is afforded even to informal pronouncements interpreting the agency's regulations. *See, e.g., Auer*, 117 S. Ct. at 911 (applying plainly erroneous standard to position taken in Secretary of Labor's amicus brief). This Court should respect the EEOC's clarification of its own definition of "substantially limits," a term undefined in the statutory text.

Finally, even in the absence of an express congressional delegation of policy-making authority, the EEOC's view

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[21] As pertinent here, the Interpretive Guidance's corrective measures rule expounds on 29 C.F.R. § 1630.2(h) (defining "impairment") and § 1630.2(j)(1) (defining "substantially limits").

would remain an important source of guidance. In *Meritor*, after withholding *Chevron* deference from the EEOC's guidelines under Title VII, the Court nevertheless followed the EEOC's interpretation, relying upon the agency's "body of experience and informed judgment." 477 U.S. at 65.[22] *Meritor* relied in turn upon *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971), which afforded "great deference" to such an administrative interpretation. The Court has given "considerable weight" even to unwritten views of an agency. *FDIC v. Philadelphia Gear Corp.*, 476 U.S. 426, 429-30 (1986) (deferring to the FDIC's longstanding unwritten policy); *accord, Commercial Office Prods.*, 486 U.S. at 115.

The EEOC Interpretive Guidance for Title I represents a large body of explanatory material on a variety of complex topics under the ADA. To inform employers and employees that they may not safely look to this Guidance to understand the scope of the ADA would create significant uncertainties, burdening the courts or requiring Congress to codify the myriad issues it intentionally left to the relevant agencies' judgment. Thankfully, such a result is contrary to this Court's teachings.

2. Through Express Legislative History And Implicit Approval Of Prior Authority, Congress Manifested Its Intention That Disabilities Under The ADA Be Determined Without Regard To Corrective Measures.

Notwithstanding the relevant agency's interpretation, if "Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. In this instance, Congress did manifest its intention on the precise question at issue. Both through express legislative history and through its implicit approval of

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[22] This Court thus gave more deference to EEOC guidelines issued some sixteen years after passage of the statute, outside of the APA notice requirements, than the court below gave to the Interpretive Guidance now at issue.

case law under the Rehabilitation Act, Congress demonstrated its intent that disability determinations under the ADA proceed without regard to corrective measures.

The August 1989 report of the Senate Committee on Labor and Human Resources on the ADA specified that the existence of a disability should be determined without considering available mitigating measures. S. Rep. No. 101-116, at 23 (1989) ("Senate Report"). In the following session, the House of Representatives Committee on Education and Labor elaborated:

> Whether a person has a disability should be assessed without regard to the availability of mitigating measures, such as reasonable accommodations or auxiliary aids. For example, a person who is hard of hearing is substantially limited in the major life activity of hearing, even though the loss may be corrected through the use of a hearing aid. Likewise, persons with impairments, such as epilepsy or diabetes, which substantially limit a major life activity are covered under the first prong of the definition of disability, even if the effects of the impairment are controlled by medication.

H.R. Rep. No. 101-485(II), at 52, *reprinted in* 1990 U.S.C.C.A.N. 303, 334 ("House Labor Report"). The report of the House Judiciary Committee contains similar language, again using the example of a hearing impaired person, who is covered even if the hearing loss can be corrected with a hearing aid. H.R. Rep. No. 101-485(III), at 28-29, *reprinted in* 1990 U.S.C.C.A.N. 445, 451 ("House Judiciary Report").[23]

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[23] The only arguably inconsistent statement to be found in this legislative history is contained in the Senate Report's discussion of persons who are protected by the Act because they are regarded as disabled. The Senate Report includes among its examples persons with medical conditions, such as diabetes or epilepsy, "that are under control, and that therefore do not currently limit major life activities." Senate Report, at 24. Even assuming that the phrase "under control" refers to the use of medication, this language is unpersuasive on the issue of corrective measures. The House Labor Report and House Judiciary Report, both of which, unlike the Senate Report, were issued in the session during which the ADA was enacted, closely track and elaborate upon the language of the Senate Report. Significantly, however, both discarded this particular example. More importantly, this language is contained in a discussion focusing on the breadth of the "regarded as" prong. If the Senate Judiciary Committee intended to permit the existence of available corrective measures to defeat the "actually disabled" prong, it would have so stated in its discussion of that provision. Instead, in explaining the "actually disabled" language, the Senate Report, like both subsequent House reports, expressly instructed against consideration of corrective measures.

The pertinent language in all three reports could hardly be clearer. The hearing aid example in both House reports is especially telling. Just as a significant hearing impairment is a disability within the meaning of the Act even if it can be completely corrected with a hearing aid, Pilots' visual impairment remains substantially limiting even though it can be corrected.[24] As this Court has counseled, the fact that the ADA "can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.' " *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956 (1998) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499 (1985)).

This legislative history persuasively demonstrates Congress' intention on the question of corrective measures. Pilots do not rely on an obscure citation in a single committee report, *compare Blanchard v. Bergeron*, 489 U.S. 87, 98 (1989) (Scalia, J., concurring), but rather on a prominent aspect of the Act's effect as reported to both houses. The legislative history of the ADA is particularly compelling in

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[24] Corrective lenses and hearing aids were treated alike elsewhere in the Labor Report. House Labor Report, at 64, *reprinted in* 1990 U.S.C.C.A.N. 303, 346 (employers are not required to pay for "personal use items" such as hearing aids and eyeglasses).

light of the Act's breadth and wide bipartisan support.[25] *See Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 276-77 (1996) (Stevens, J., concurring) (where a statute received bipartisan support and was carefully considered by the responsible committees, "the intent of those involved in the drafting process is properly regarded as the intent of the entire Congress").

This Court has consistently respected relevant legislative history of the Rehabilitation Act, the ADA's closest cousin. *See, e.g., Alexander v. Choate*, 469 U.S. 287, 295-96 (1985); *Darrone*, 465 U.S. at 631 n.10, 633-34; *Southeastern Community College v. Davis*, 442 U.S. 397, 405 n.6 (1979). Most notably, in *School Board of Nassau County, Florida v. Arline*, *supra*, this Court interpreted § 504 of the Rehabilitation Act to protect from discrimination a person suffering from contagious tuberculosis, concluding that "[n]othing in the legislative history of § 504 suggests that Congress intended" the defendants' suggested limitation. *Id.* at 282-83 & n.9. Here, the legislative history is even stronger, affirmatively demonstrating that Congress did *not* intend the lower court's restrictive construction of the ADA.

This conclusion is further supported by Congress' implicit approval of prior case law under the Rehabilitation Act, which consistently protected substantially impaired persons whose impairments were partially or wholly correctable. Congress provided that the ADA is to be applied at least as broadly as the Rehabilitation Act. 42 U.S.C. § 12201(a) (1994). The Court must therefore be wary of imposing limitations on the protections afforded by the Act that were not recognized prior to its enactment in 1990. In *Bragdon v. Abbott*, this Court heavily emphasized the administrative and judicial interpretation of the Rehabilitation Act prior to 1990, following the general rule that Congress is presumed to be aware of existing judicial

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[25] The conference reports on the ADA were approved in the House and Senate by votes of 377-28 and 91-6, respectively. *Congress Clears Sweeping Bill to Guard Rights of Disabled*, 48 Cong. Wkly. Rep. Q. 2227 (1990).

interpretations of statutory language it re-enacts. *Lorillard v. Pons*, 434 U.S. 575, 581 (1978); *Keene Corp. v. United States*, 508 U.S. 200, 212-13 (1993).

Prior to 1990, courts typically did not question that the Rehabilitation Act remained applicable to impairments that could be partially or completely corrected. In *Strathie v. Department of Transportation*, 716 F.2d 227 (3d Cir. 1983), the Third Circuit reinstated a Rehabilitation Act claim in favor of a bus driver who was suspended due to his poor uncorrected hearing, even though his hearing could be corrected with a hearing aid.[26] *Id.* at 228-29. In *Reynolds v. Brock*, 815 F.2d 571 (9th Cir. 1987), the Ninth Circuit held a plaintiff's condition of epilepsy to be a handicap, "[e]ven though medication controls her seizures." *Id.* at 573-74. Indeed, courts routinely permitted claims based upon medicated conditions such as diabetes or epilepsy without even considering the extent to which the conditions could be controlled with medication. *E.g., Bentivegna v. United States Dept. of Labor*, 694 F.2d 619 (9th Cir. 1982) (diabetes); *Davis v. United Air Lines, Inc.*, 662 F.2d 120 (2d Cir. 1981) (epilepsy), *cert. denied*, 456 U.S. 965 (1982). In the only reported case prior to the ADA's passage addressing the specific question of significantly impaired but correctable vision,[27] the

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[26] Congress made specific reference to the *Strathie* decision in considering the ADA. *See* Labor Report, *supra*, at 74 (citing *Strathie*), *reprinted in* 1990 U.S.C.C.A.N. 303, 357; *Americans with Disabilities Act of 1989: Hearings on S. 933 Before the Senate Committee on Labor and Human Resources and the Subcommittee on the Handicapped*, 101st Cong., 1st Sess. 328-29 (1989) (prepared statement of Arlene B. Mayerson) (discussing *Strathie* and *Jackson v. State*, 544 A.2d 291 (Me. 1988) (upholding Rehabilitation Act claim of insulin-controlled diabetic), *cert. denied*, 491 U.S. 904 (1989)).

[27] There is limited authority under the Rehabilitation Act addressing the circumstances of uncorrectable vision impairments or, at the other extreme, vision impairments sufficiently mild as not to require corrective lenses. *Compare Norcross v. Sneed*, 755 F.2d 113 (8th Cir. 1985) (treating vision correctable only to 20/200 as a handicap), *with Jasany v. United States Postal Serv.*, 755 F.2d 1244 (6th Cir. 1985) (holding that a condition

court treated as handicapped a myopic person whose vision of 20/120 in one eye and 20/300 in the other could be corrected to 20/20 with bioptic lenses. *Sharon v. Larson*, 650 F. Supp. 1396 (E.D. Pa. 1986).[28]

This Court's reasoning in *Bragdon*, 118 S. Ct. at 2208, is directly applicable. There is no instance prior to the enactment of the ADA in which a court or agency ruled that a substantial impairment is excluded from protection under the Rehabilitation Act if it is correctable.[29] The ADA should be construed in light of this line of authority, particularly where Congress gave its "active endorsement" to this prevailing rule in the relevant legislative history, *id.*, and "has expressed no dissatisfaction" with either the EEOC's Interpretive Guidance or the lower courts' majority rule. *Philadelphia Gear*, 476 U.S. at 437. Adhering to this well-established rule is "the most faithful way to effect the congressional design." *Bragdon*, 118 S. Ct. at 2208.

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of crossed eyes so mild that even untreated it had no effect on plaintiff's abilities was not a handicap). Neither extreme is instructive on the corrective measures issue, which is relevant only to the intermediate category of persons with vision impairments that are sufficiently severe to be substantially limiting but that are correctable.

[28] Bioptic lenses consist of conventional contact lenses with an additional telescopically enlarged central image. Because this creates a significant blind spot around the central image, the court concluded that the plaintiff was not otherwise qualified to obtain a driver's license. 650 F. Supp. at 1402.

[29] That argument has occasionally been advanced in Rehabilitation Act decisions subsequent to 1990. *See, e.g., Mackie v. Runyon*, 804 F. Supp. 1508, 1510-11 (M.D. Fla. 1992) (finding mental illness not substantially limiting where corrected by medication); *but see Fallacaro v. Richardson, supra* (severe but correctable myopia is a handicap under the Rehabilitation Act). The court in *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993), suggested that a person with impaired vision, even if uncorrectable, or an insulin-dependent diabetic would not be handicapped under the Rehabilitation Act. The Fifth Circuit has since expressly disavowed application of this suggestion to the ADA. *Washington*, 152 F.3d at 470 n.9.

3. Evaluating Disabilities Without Regard To Corrective Measures Best Effectuates The Purpose Of The ADA.

As part of "an ongoing congressional effort to eradicate discrimination in the workplace," *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 357 (1995), Title I of the ADA is intended to permit disabled persons to overcome employers' unfounded preconceived notions of their capabilities. As demonstrated by the present case, including individuals with correctable disabilities properly effectuates that statutory purpose. In contrast, the lower court's approach would only undermine that purpose and needlessly require courts to dictate what treatments, medications, or other measures each disabled person must undergo.

Congress structured the ADA to define broadly who is disabled, but limited its remedies only to those who can demonstrate they are qualified to perform the work they seek. *Arline*, 480 U.S. at 285. This structure removes arbitrary and artificial barriers to employment, *see Griggs*, 401 U.S. at 431 (1971), and ensures employees "even-handed treatment," *Traynor v. Turnage*, 485 U.S. 535, 548 (1988), by requiring their abilities to be evaluated on the basis of medical evidence rather than mythology. *Arline*, at 285. That is exactly what Pilots seek in this case. Pilots merely request the opportunity to prove that they are qualified to perform the job for which they have been trained. They allege that they have been denied a lifelong employment goal on the basis of physical limitations unrelated to legitimate job qualifications. Their action illustrates that the majority rule against consideration of corrective measures directly advances the ADA's remedial purpose of promoting and expanding employment opportunities for those who can overcome significant physical impairments. *See Darrone*, 465 U.S. at 632-34 & n.13 (emphasizing remedial purpose of Rehabilitation Act, which "cannot be read in isolation from its history and purposes") (citations omitted).

In its opinion below, the Tenth Circuit disparaged Pilots' position – that they are disabled but nevertheless fully capable of performing the work at issue – as trying to "have it both ways." J.A. 66. The court stated that if Pilots' vision impairment meets the statutory definition of a disability, then as a matter of law Pilots are not qualified for a position with United. *Id.* These remarks reveal a profound misunderstanding of the structure and purpose of the Act.[30] Title I of the ADA protects *only* those individuals who, despite a significant physical impairment, can perform all of the essential functions of the job. *See Arline*, 480 U.S. at 287-89 & n.17 (plaintiff could state a claim only if she could prove she was qualified for the job of elementary schoolteacher and perform the job's essential functions); *cf. Southeastern Community College v. Davis*, 442 U.S. at 406 ("An otherwise qualified person is one who is able to meet all of a program's requirements in spite of his handicap.").

This design is embodied in the language of the statute. For example, the statute expressly protects those who are capable of doing the job *with or without* any reasonable accommodation. 42 U.S.C. § 12111(8) (1994). Yet under the Tenth Circuit's view, one who is able to perform the job without even requiring a reasonable accommodation is surely

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[30] It is far more consistent with the purpose of the statute to conclude that *United* is trying to "have it both ways." It chose to disqualify Pilots on the basis of their uncorrected vision, eschewing the FAA's vision requirements, which are based solely on corrected vision. Now in court it reverses field and argues that only Pilots' corrected vision is reflective of their abilities and disabilities. *See Wilson*, 964 F. Supp. at 906 (observing "a certain irony inherent in defendants' argument" that a person who wears glasses is not substantially limited but is unfit to be a state trooper); *Fallacaro*, 965 F. Supp. at 93 ("The very fact that the IRS has a requirement for uncorrected as well as for corrected vision recognizes that the availability of corrective eyewear does not make a visual disability irrelevant."); Robert L. Burgdorf, *The Americans with Disabilities Act: Analysis and Implications of a Second-Generation Civil Rights Statute*, 26 Harv. C.R.-C.L. L. Rev. 413, 448 (1991) (expressing concern that those with correctable disabilities "may be placed in a Catch-22 situation").

not disabled at all, but simply trying to "have it both ways." Whatever the dubious merits of this viewpoint, it is directly at odds with the core purpose of the ADA. *Arnold*, 136 F.3d at 861. Unlike the majority of the lower courts, the Tenth Circuit has disregarded this Court's longstanding directive to "construe the details of an act in conformity with its dominating general purpose." *SEC v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 350 (1943); *see also United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993). Instead, the court below has placed a sweeping new restriction upon the scope of the ADA that carries potentially disastrous consequences.

The Tenth Circuit's view that courts should take corrective measures into account can be carried out in one of two ways, either of which is antithetical to the goals of the Act. The first possibility would be for courts to consider only the corrective measures a given individual actually employs. Alternatively, courts could determine what measures are potentially available, whether or not the individual chooses to use them. Neither option is viable.

The emphasis of the court below on an impairment's "actual effect on the individual's life," J.A. 65, implies that the court would examine each plaintiff's condition in light of the corrective measures she is actually using. This approach would lead to absurd results. For example, Petitioners in this case would have become eligible for statutory protections had they thought to destroy their glasses before commencing the interview process. More importantly, the Tenth Circuit's rule would actively *discourage* those with impairments from taking all possible steps to improve their conditions. By "confus[ing] the disease with its treatment," *Matczak*, 136 F.3d at 937, this approach would transform the ADA into a mechanism for penalizing the disabled for finding ways to overcome their physical limitations. "It is hard to imagine that Congress wished to provide protection to workers who leave it to their employer to accommodate their impairments but to deny protection to workers who act independently to overcome their disabilities." *Arnold*, 136 F.3d at 863 n.7.

The alternative is to consider any potentially available corrective measure, whether or not a given individual has chosen to use it. This would empower employers, and ultimately courts, to dictate what corrective measures disabled persons must undertake to correct their disabilities. It would become a matter of judicial discretion, rather than personal choice in consultation with one's physician, whether an impaired person should accept medication with significant side effects, seek out experimental treatments, undergo invasive surgery, and so forth. This approach is contrary to this Court's admonishment that courts must be "cautious not to rewrite legislation" in "areas fraught with medical and scientific uncertainties." *Marshall v. United States*, 414 U.S. 417, 427 (1974); *see also Traynor v. Turnage*, 485 U.S. at 552 ("It is not our role to resolve this medical issue on which the authorities remain sharply divided."). Since the statute offers no standards to employ in making such judgments, the rule would almost certainly be applied in an arbitrary and inconsistent fashion, offering employers and employees alike no guidance as to when the provisions of the ADA apply. If Congress had intended to create such a peculiar statutory scheme – delegating to courts the role of dictating what steps impaired persons must take in order *not* to be protected by the statute – it surely would have so stated expressly.

Because the Tenth Circuit's construction defeats the purposes of the Act, this Court should follow it only if compelled by the plain language of the statute.

4. The Language Of The Statute Supports Determination Of Disabilities Without Regard To Corrective Measures.

Thankfully, the language of the ADA, although not directly addressing this precise issue, supports the majority view. Even if this Court were to disregard *Chevron* and interpret the statute anew, rather than simply confirming that the agency construction is a permissible reading of the ADA, it should still conclude that the existence of a disability must

be determined without regard to available corrective measures.

The majority rule reflects a superior construction of the statute for three reasons. First, the statute reaches any impairment that "substantially limits" a major life activity. The term "substantially limits" reasonably encompasses the inability to perform a major life activity except with the assistance of medication or a corrective device. Second, a contrary reading of this phrase is inconsistent with other key provisions of the ADA. Third, Congress' failure to expressly limit disabilities covered under the ADA to uncorrectable conditions strongly counsels against judicial creation of such a restriction.

The first flaw in the lower court's reasoning is its reading of the phrase "substantially limits" as restricting the Act's protections only to correctable impairments. This construction diverges sharply from this Court's unwillingness to read limitations into the operative language of the ADA not stated explicitly in the text. *See Bragdon*, 118 S. Ct. at 2205 (argument that "major life activities" under the ADA are limited to matters of a public, economic, or daily character "founders on the statutory language"); *Darrone*, at 465 U.S. at 632 (rejecting proposed limitation of § 504 to federal aid designed to promote employment where "§ 504 itself contains no such limitation"). The court below determined that Pilots' vision is substantially limited without corrective measures, but is not substantially limited with corrective measures. To then emphasize that Pilots can see with corrective lenses begs the question. It is impossible to apply the "substantially limits" test without *first* deciding whether to examine the corrected or uncorrected state.

The phrase "substantially limits" is more easily read to support the majority rule. As the Court instructed in *Bragdon*, the ADA "addresses substantial limitations on major life activities, not utter inabilities." 118 S. Ct. at 2206. In *Bragdon*, plaintiff's major life activity of reproducing was restricted by the serious health risks her condition created. Here, Pilots' major life activity of seeing is restricted in that they cannot perform it without the aid of corrective measures. The limitation in this case is thus even more direct. Pilots'

limitation does not merely affect the wisdom or desirability of performing the major life activity, but the physical ability to perform it at all. Whereas the *Bragdon* plaintiff was at least physically capable of reproducing, with or without the use of corrective measures,[31] Pilots essentially cannot see without corrective lenses.

The *Bragdon* analysis is consistent with the EEOC's definition of "substantially limited" as "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity." 29 C.F.R. § 1630.2(j)(1)(ii) (1998). The Commission reasons that a person who "cannot perform major life activities without the aid of medication," is significantly restricted. 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998). This applies to Pilots. Pilots can see only with corrective lenses, just as many with hearing impairments can hear only with a hearing aid, and many diabetics can function only with insulin. This is a *restriction* upon Pilots' ability to perform a major life activity.[32] The restriction is *significant*, in that it is neither a hypothetical limitation nor limited to particular circumstances, but exists at all times.[33] "It is certainly no affront to common English usage," *Chevron*, at 860, to consider the inability to perform a major life activity without resort to

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[31] The corrective measure of antiretroviral therapy could lower, but not eliminate, the risks of choosing to reproduce. 118 S. Ct. at 2206. It is noteworthy that the Court included the costs of such therapy among the limitations caused by plaintiff's condition. *Id.*

[32] In contrast, a person would likely not be restricted who elects to employ a corrective measure but is able to perform the relevant life activity even without it. Examples would be a person who takes mild painkillers for arthritis but can function without them, or a person with a mild hearing impairment who uses a hearing aid even though he can hear adequately without it.

[33] A corrective measure that is necessary only on a sporadic basis, for example medication for a severe allergy to a particular pollen that is prevalent only for a short time each year, would arguably be a restriction but not a significant restriction.

corrective devices or medication to be a "significant restriction" or a "substantial limitation."

The lower court's construction of the ADA is flawed for a second reason: it is at odds with other key provisions of the ADA. For example, the lower court's reasoning applies equally to impairments mitigated by a reasonable accommodation. The ADA permits a person who is substantially limited in the major life activity of working to ask for a reasonable accommodation by the employer in order to overcome the limitation. Under the lower court's reasoning, however, if the individual is able to work with a reasonable accommodation, then the impairment no longer "affects the individual in fact."[34] J.A. 64. This illustrates the flaw in the lower court's analysis. The fact that an employee can perform a job only with a reasonable accommodation is itself a substantial limitation. By the same token, the ability to perform a major life activity only with medication or other corrective measures is also a substantial limitation.[35]

Similarly, the Tenth Circuit's reasoning cannot be reconciled with the second prong of the definition of disability, having a "record of" being disabled. The "record" prong illustrates that Congress intended to protect an impaired person even though the person "may at present have no actual incapacity at all." *Southeastern Community College v. Davis*, 442 U.S. at 405-06 n.6; *see also Arline*, at 279. This provision demonstrates the incongruous results that the Tenth Circuit's approach would require. Consider the EEOC's example of a

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[34] To borrow an example from the EEOC, an employee who is restricted from a class of jobs because he cannot carry heavy objects may ask his employer to provide a dolly as a reasonable accommodation. EEOC, *Technical Assistance Manual on the Employment Provisions (Title I) of the ADA* III-9 to -10 (1992). But the Tenth Circuit's reasoning would compel the conclusion that, because the employee is able to work in the relevant class of jobs simply by using a dolly, he is not substantially limited at all.

[35] After all, a corrective measure is nothing more than a reasonable accommodation provided by an individual herself, rather than by her employer.

person with heart disease that has been cured. EEOC, *Technical Assistance Manual*, at II-8 (1992). The "record" prong of the ADA protects this person. Yet a person with heart disease that cannot be cured, but only controlled through medication or use of a pacemaker would, according to the court below, not be protected. It is inconceivable why the latter situation should be deemed less deserving of protection under the Act.

As this demonstrates, the decision below works unacceptable mischief to Congress' statutory design. The lower court failed to properly apply the term "substantially limits" in its context within the structure of the ADA as a whole. *See United States Nat'l Bank of Oregon v. Independent Ins. Agents of Am.*, 508 U.S. at 455 (1993) ("in expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy") (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *Green v. Bock Laundry Mach. Co.*, 490 U.S. 504, 528 (1989) (terms in a statute must be read in the context of the "surrounding body of law into which the provision must be integrated") (Scalia, J., concurring). The first prong of the ADA's definition of disability at a minimum protects those persons who presently have an impairment that is substantially limiting even after applying available mitigating measures. The second prong of the ADA protects those who previously had, but no longer have, a substantially limiting impairment. There is nothing in this structure to suggest that Congress wished not to protect an intermediate category of persons who have experienced a substantially limiting impairment and have not been able to eliminate the impairment, but are able to correct the symptoms on an ongoing basis using medication or other means.

The third flaw in the lower court's construction of the statute is that it adds terms to the Act that Congress chose not to employ. Congress could have explicitly instructed courts to consider impairments after taking into account reasonably available corrective measures, or simply specified that the statute reaches "impairments after treatment" or "uncorrectable impairments." *Sicard v. City of Sioux City*, 950 F. Supp. 1420, 1436 (N.D. Iowa 1996). Congress could have required

plaintiffs to exhaust available medical remedies before bringing an action, just as it often requires plaintiffs to exhaust administrative remedies. Alternatively, it could have charged any of the enforcing agencies with conducting an analysis of which commonly experienced impairments can and cannot be corrected with current medical technology.

This Court has always been skeptical of attempts to add words into a statute that Congress could have inserted itself if it desired. *See, e.g., United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597 (1986) (refusing to add words "indirect recipients" to Rehabilitation Act); *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994) (refusing to add words "aiding and abetting" to securities statute). Attempts to infer restrictions in broad remedial legislation are particularly suspect. *See North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 530 (1982); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798-99 (1973). Certainly Congress knew how to limit the scope of the ADA where it wished. Indeed, it inserted express exceptions for many categories of individuals it determined it did not wish to protect. 42 U.S.C. §§ 12114(a) (current users of illegal drugs); 12210(a) (same); 12208 (transvestites); 12211(a) (homosexuality and bisexuality); 12211(b)(1) (sexual behavior disorders), 12211(b)(2) (compulsive gambling, kleptomania, or pyromania). It could as easily have excepted correctable impairments, but chose not to. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 23 (1981) (concluding that Congress manifested its intentions by placing restrictive conditions on some provisions of an act but not others); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (presuming that Congress' inclusion of some exemptions but not others was deliberate). Because Congress did not speak directly to the issue, to exclude a broad category of individuals from statutory protection in defiance of the implementing regulations under the ADA as well as the relevant legislative history would be arbitrary, unfair, and unfaithful to basic canons of statutory construction. *Arline*, at 286-87 n.15.

B. The Rule Against Consideration Of Corrective Measures Applies To Myopia.

The First Circuit in a footnote has questioned, but not decided, whether correctable myopia should be made an exception to the majority rule against consideration of corrective measures. *Arnold*, 136 F.3d at 866 n.10. This Court should not create such an exception. There is no principled distinction between severe myopia and other correctable impairments, nor is there any practical reason to exempt severe myopia from the general rule.

1. There Is No Principled Distinction Between Severe Myopia And Other Substantially Limiting, But Correctable, Impairments.

The view that myopia should receive different treatment than any other substantial, but correctable, impairment is devoid of any defensible theoretical underpinnings. The position is divorced from the language of the statute, the relevant legislative history, and the EEOC regulations and Interpretive Guidance, none of which treat vision impairments differently from other impairments. There is no justifiable limitation that might be imposed upon the scope of the ADA that would act to exclude myopia but not other correctable impairments.

The only lower court to follow the majority rule against consideration of corrective measures, but affirmatively advance a limited exception, is the Fifth Circuit. In *Washington*, *supra*, the Fifth Circuit proposed that the majority rule should not encompass "permanent corrections" such as an organ transplant. 152 F.3d at 471. Such an exception would have little effect in practice. A disability that has been "permanently corrected" need not qualify as an actual disability, since it will typically receive the ADA's protection based upon the individual's record of having a disability. In any event, the exception would provide no comfort to United, because Pilots' impairment has not been permanently corrected. While the Fifth Circuit declined to state a position regarding corrective lenses, *id.*, it did declare that diabetes, epilepsy, and hearing impairments would be considered in the

uncorrected state. *Id.* at 470. Pilots' corrective measure is similarly ongoing. They use corrective lenses every day just as a person with impaired hearing uses a hearing aid every day.

The *Arnold* footnote observed that corrective lenses can provide total control of the symptoms of myopia. 136 F.3d at 866 n.10. Allowing this to be a basis for evading the majority rule against consideration of corrective measures would deprive the rule of any meaning. After all, an impairment that remains substantially limiting even after applying available mitigating measures is necessarily a disability, regardless of whether the court takes the mitigating measures into account.[36] Thus, the corrective measures issue is relevant only in those cases where an impairment's limiting effects can in fact be corrected. To adopt the rule that courts should consider impairments in the uncorrected state, but confine it to impairments that cannot be corrected, would render the rule a tautology.

The related argument that corrective lenses need no protection because they are simple to employ would also largely defeat the rule against consideration of corrective measures. The act of putting in contact lenses is comparable to putting in a hearing aid, taking daily medication, strapping on a prosthetic limb, and so on. As demonstrated above, all of these corrective measures address impairments exactly of the nature that Congress intended the ADA to cover. There is no reason to sanction disability discrimination against certain disabled persons simply "because their prosthetic device happens to be exceptionally good." *Fallacaro v. Richardson*, 965 F. Supp. 87, 93 (D.D.C. 1997). To the contrary, this only makes the discrimination more pernicious.[37]

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[36] This is why this Court did not need to decide the corrective measures issue in *Bragdon*. The Court deemed plaintiff's impairment to be substantially limiting even with available corrective measures. 118 S. Ct. at 2206.

[37] An analogy to the requirement that employers provide reasonable accommodations illustrates the point. Courts are less tolerant, not more

None of these purported justifications proceed from any principled distinction between myopia and other impairments. At best, they may reflect a concern that it might be poor public policy to include severe but correctable myopia within the ADA. Even if there were any validity to this concern, the decision to exempt one particular type of impairment from the Act for policy reasons must come from Congress. Courts should not draw distinctions under the statute "on the basis of judges' personal policy preferences." *Chevron*, 467 U.S. at 865.

2. There Is No Practical Reason To Distinguish Severe Myopia From Other Substantially Limiting, But Correctable, Impairments.

While this Court need not reach the issue, the assertion that there is a strong policy justification for exempting severe myopia from the general rule against consideration of corrective measures does not withstand serious scrutiny. The ADA should protect from discrimination the small minority of Americans with severe myopia comparable to Pilots, just as it protects other Americans with substantial, but correctable, impairments.

The argument against myopia seems to rest upon the concern that because there are many Americans who wear glasses or contact lenses, it would be imprudent to include this group within the ADA. This fear proceeds from a fallacy. The rule against consideration of corrective measures does *not* render a person disabled merely by virtue of the fact that she uses a corrective measure. The lower courts that have joined the majority rule have been careful to observe that the use of a corrective measure in itself is not a disability. *See Harris*, at 521; *Roth*, at 454; *Matczak*, at 937-38. Certainly Pilots have never argued that wearing glasses is a *per se* disability. To the contrary, it is United that seeks to impose a *per se* rule, that a person may never be considered disabled on the basis of correctable myopia.

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tolerant, of an employer's refusal to make an accommodation where the accommodation is relatively simple and inexpensive.

Many Americans experience myopia so minor that, even left uncorrected, the condition either would not be substantially limiting or would not qualify as an impairment at all. *See Trembczsynski v. City of Calumet City*, 1987 WL 16604 (N.D. Ill. August 31, 1987) (holding that vision worse than 20/20 but better than 20/40 is not an impairment). Pilots' action does not require the Court to attempt to determine exactly what level of vision impairment may constitute a substantial impairment, a question best left to case-by-case determination. It is sufficient that Pilots' allegations amply supports the Tenth Circuit's conclusion that, without corrective lenses, their vision is a substantially limiting impairment.

Pilots' vision is not better than 20/200 in one eye and 20/400 in the other. This places them in the small minority of Americans with severe impairment of visual acuity. *See* David J. Lee, et al., *Prevalence of Uncorrected Binocular Distance Visual Acuity in Hispanic and Non-Hispanic Adults*, 105 Ophthalmology 552, 553-54 (1998) (categorizing uncorrected vision worse than 20/50 as a "mild" impairment, worse than 20/100 as a "moderate" impairment, and worse than 20/200 as a "severe" impairment). Data from the National Health Survey conducted through the Department of Health, Education, and Welfare has in the past revealed only 2.4% of the adult population as suffering from uncorrected vision worse than 20/200. Jean Roberts, *Binocular Visual Acuity of Adults, United States, 1960-1962* 3 (National Center for Health Statistics, Series 11, No. 3; Public Health Service publication no. 1000, 1968). The most recent available calculation estimates that 7,882,000 Americans between the ages of 25 and 74 have uncorrected visual acuity worse than 20/200. Lee, *supra*, at 556. Simply stated, the average American does not share Pilots' impairment.

The group of Americans sharing Pilots' severe visual impairment is well within the range that Congress contemplated in enacting the ADA. Congress deliberately chose not to limit the scope of the statute to "traditional handicaps." *Arline*, at 280 n.5. The opening sentence of the Act anticipated that its coverage would extend to some 43 million Americans. 42 U.S.C. § 12101(a)(1) (1994).

While there are certainly many Americans with severely impaired vision, this is hardly cause for alarm. In determining the effect protection under the ADA may have upon employers and the judiciary, it is not the raw number of persons with impaired vision that is relevant, but only the number of such persons who face discrimination because of their impairment. Few, if any, employers have cause to restrict applicants from employment for which they are qualified on the basis of uncorrected vision. Judging from the dearth of reported case law on the issue of correctable myopia, such discrimination is apparently very rare.

In any event, the Court should not withdraw the protections of the ADA from particular impairments based only on a head count. Eliminating those with severely impaired vision from coverage under the ADA based upon their sheer number would set a far-reaching precedent, since a comparable or greater number of Americans suffer from other significant impairments such as diabetes, hypertension, heart disease, hearing impairments, and arthritis. *Statistical Abstract of the United States* 149 (Bureau of the Census, 118th ed. 1998). Such a numeric approach is unfaithful to the goals underlying the ADA and the Rehabilitation Act, acts patterned on the Civil Rights Act, the protections of which are available to *all* Americans. *Arline*, at 277-78 n.2; *Darrone*, 465 U.S. at 626. Creating an exception for severe, but correctable, vision impairments would invite the lower courts to exclude from the protections of the ADA millions of Americans with other severe, but widely experienced, impairments. There is no theoretical or practical reason to so narrow the scope of the ADA in defiance of Congress' clear intentions.

II. UNITED REGARDED PILOTS AS DISABLED IN THE MAJOR LIFE ACTIVITY OF WORKING.

A separate and independent basis for reversing the lower court's decision is its failure to properly apply the third prong of the ADA's definition of a disability. Even in the absence of an "impairment that substantially limits one or more . . . major life activities," the Act protects individuals from "being

regarded as having such an impairment." 42 U.S.C. § 12102(2)(A), (C) (1994). Pilots' allegations establish a claim under this provision. The lower court's conclusion that Pilots did not adequately allege that United regarded them as disabled with respect to a class of jobs is incorrect.

A. By Disqualifying Pilots From Any Of Its Flying Positions Based Upon Their Physical Impairment, United Regarded Pilots As Disabled.

As this Court emphasized in *Arline*, the "regarded as" language of the ADA is a crucial component of Congress' effort to eliminate discrimination against individuals based upon unfounded, generalized perceptions of their abilities. Regardless of whether Pilots' vision impairment is deemed substantially limiting, United treated it as such by considering Pilots to be unfit to fly in United's fleet. Because this discrimination was based upon a physical characteristic unrelated to Pilots' actual abilities, it runs afoul of the ADA.

Persons who are regarded as having an impairment, even though they actually have no incapacity, are exactly the kind of individuals the Rehabilitation Act and the ADA are intended to protect. *Southeastern Community College v. Davis*, 442 U.S. at 405-06 n.6. The "regarded as" provision protects an individual whose impairment does not substantially diminish her capabilities, "but could nevertheless substantially limit that person's ability to work as a result of the negative reactions of others to the impairment." *Arline*, 480 U.S. at 283. This Court has emphasized that this provision is central to achieving the core purpose of the Rehabilitation Act and the ADA:

> [T]he basic purpose of § 504 . . . is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or the ignorance of others. By amending the definition of "handicapped individual" to include not only those who are actually physically impaired, but also those who are regarded as impaired and who, as a

> result, are substantially limited in a major life activity, Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment.

Arline, at 284 (footnote omitted).

Pilots have alleged precisely such discrimination on the basis of unfounded perceptions. Their allegations demonstrate that United regarded them as substantially limited in the major life activity of working.[38] United discriminated against Pilots based on a single physical limitation, poor uncorrected vision, deeming them unfit for any of its thousands of piloting positions around the world. Even if Pilots' uncorrected vision is not in itself substantially limiting, Pilots at a minimum have adequately alleged that it "is treated by a covered entity as constituting such limitation." 29 C.F.R § 1630.2(l)(1) (1998).

Pilots allege that United's policy is unsupported by any legitimate safety concerns, and is based only on myth, fear, and stereotype. J.A. 24-25, ¶ 38(b)-(e). This Court has instructed that permitting an employer to act without challenge upon a purported threat to health and safety would render employees "vulnerable to discrimination on the basis of mythology – precisely the type of injury Congress sought to prevent." 480 U.S. at 285. Indeed, the "regarded as" prong was intended to lower attitudinal barriers based upon "concerns regarding . . . safety, insurance, liability." House Judiciary Report, at 30.[39] Thus, where an employer alleges discrimination as a result of unfounded safety concerns, a

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[38] Contrary to the Tenth Circuit's suggestion, J.A. 67 n.9, Pilots' allegations also encompass the fact that United regards them as substantially limited in seeing. J.A. 23-27. As they did in the court below, however, Pilots will focus upon the life activity of working, as it goes to the heart of United's unfounded perceptions.

[39] The House Judiciary Report was careful to point out, however, that a plaintiff is not required to prove that the discrimination was occasioned by such safety concerns. *Id.* ("It is not necessary for the covered entity to articulate one of these concerns.").

court may infer that the discrimination is based upon myth, fear, and stereotype. Discrimination on the basis of myth, fear, and stereotype, while not an express requirement of the statute, *Deane v. Pocono Medical Ctr.*, 142 F.3d 138, 144 (3d Cir. 1998), is in itself sufficient to demonstrate that United regarded Pilots as disabled. 29 C.F.R. pt. 1630, App. § 1630.2(l), at 350 (1998) ("[a]n individual rejected from a job because of the 'myths, fears and stereotypes' associated with disabilities would be covered under this part of the definition of disability").

Few industries are as susceptible to "public fear and misapprehension," 480 U.S. at 284, as the airline business. Under this Court's holding in *Arline*, United cannot discriminate on the basis of such fears unless it can prove they have a factual basis.

B. Because It Deemed Them Unfit For Any Piloting Positions, United Regarded Pilots As Disabled With Respect To A Class Of Jobs.

Emphasizing that Pilots were able to find work with regional airlines, the court below determined that United does not regard Pilots as substantially limited in working, because United's perceptions do not eliminate Pilots from a class of jobs. The lower court reached this conclusion despite acknowledging that it is the perceptions of United, not other employers in the field, that are relevant. J.A. 71. The court's holding can only be supported by improperly assuming that Pilots' factual allegations are false.

1. It Is Not A Defense To Pilots' Claim That Some Employers Do Not Discriminate As Does United.

Assuming that Pilots must prove that United regarded them as disabled with respect to a class of jobs, it is not necessary for Pilots to demonstrate that all other employers so regard them as well. United is not relieved of responsibility under the ADA merely because some employers do not share its discriminatory attitudes.

The ADA's implementing regulations specify that a person is not substantially limited in the major life activity of working unless "significantly restricted in the ability to perform either a class of jobs or a broad range of jobs." 29 C.F.R. § 1630.2(j)(3)(i) (1998). A "class of jobs" refers to those positions utilizing similar training, knowledge, skills or abilities within a given geographical area. 29 C.F.R. § 1630.2(j)(3)(ii) (1998); 29 C.F.R. pt. 1630, App. § 1630.2(j), at 348 (1998); *DePaoli v. Abbott Labs.*, 140 F.3d 668, 673 (7th Cir. 1998). Beginning with *E.E. Black, Ltd. v. Marshall*, 497 F. Supp. 1088 (D. Haw. 1980), decided under the Rehabilitation Act, the lower courts have also consistently held that an individual is not actually disabled in the major life activity of working unless her condition precludes her from working in a class of jobs, such that there is "a significant reduction in a person's real work opportunities." *Webb v. Garelick Mfg. Co.*, 94 F.3d 484, 488 (8th Cir. 1996). In this case, Petitioners' pertinent training, knowledge, skills, and abilities all relate to flying as commercial airline pilots. Hence, under the class of jobs requirement, Pilots are not *actually* disabled with respect to the major life activity of working unless significantly restricted in the ability to obtain work as airline pilots.

Crucially, however, Pilots need not prove that they are excluded by all employers within the relevant class in order to show that United *regarded* them as disabled with respect to the major life activity of working. Under the "regarded as" prong, only the misperceptions of the specific employer are relevant. The House Judiciary Report instructed that the "regarded as" prong applies "whether or not the employer's perception [is] shared by others in the field." House Judiciary Report, at 30. The EEOC included this same language in its Interpretive Guidance. 29 C.F.R. pt. 1630, App. § 1630.2(l), at 350 (1998).

There is a basic distinction between an individual's actual ability to work, and an employer's misperceptions of her ability. In adopting the class of jobs requirement, the court in *E.E. Black* was careful to observe that the requirement could not be used to defend an employer's perceptions

not shared by others in the industry. The court explained that "it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process." 497 F. Supp. at 1100. The Fifth Circuit emphasized this distinction in *Deane v. Pocono Medical Center*, 142 F.3d at 144, in the context of a nurse who alleged that her employer regarded her as disabled in the class of jobs of nursing due to her severe wrist injury:

> The second ground [for summary judgment] – that Deane's subsequent employment in the field of nursing demonstrated that she was not substantially limited in the major life activity of working – confuses her actual impairment with PMC's misperception thereof. Deane's subsequent work history could, at most, reflect her lack of an actual disability, and it therefore sheds no light whatever on whether, at the time of her termination, PMC regarded her impairment as substantially limiting her ability to work.

A contrary approach would eliminate any possible claim that an employer regarded an individual as substantially limited in the major life activity of working. A claim would be available only to an individual who could prove that she was actually foreclosed from obtaining a job within the relevant class with any employer. Since this evidentiary showing is sufficient to demonstrate that an employee is *actually* disabled in working, *see Arline*, at 283 n.10 (an impairment that prevents one from working is a disability, even if it affects no other major life activity), the "regarded as" prong would become superfluous. Employers would thus be rewarded for applying discriminatory criteria so far removed from actual job requirements that they are unique in the industry.

Even the court below did not go so far, conceding that "[i]t is the perception of the employer in the case, not the perceptions or practices of others in the industry, that matters." J.A. 71 (citing *Cook v. State of R.I., Dept. of Mental Health, Retardation and Hosps.*, 10 F.3d 17, 25-26 (1st Cir. 1993)).

2. United Regarded Pilots As Unfit To Perform A Class Of Jobs.

Limiting attention only to United's perceptions, it is apparent that Pilots have stated a claim under the "regarded as" provision of the ADA. United has judged Pilots unfit for any of its flying positions, and there is no valid distinction between United's positions and others within the same class of jobs.

The court below correctly stated, but did not apply, the rule that "in order to establish a disability under the 'regarded as' prong of the ADA with respect to the major life activity of working, an individual must show that the employer regarded him or her as being substantially limited in performing either a class of jobs or a broad range of jobs in various classes." J.A. 70. Pilots have alleged exactly that. United disqualifies Pilots from any of its thousands of piloting positions, without regard to aircraft model, route, or flying conditions. J.A. 25-26, ¶ 38(f), (g).

This is not a case of an employer excluding an individual only from certain of its positions within the class of jobs. *Compare Dutcher v. Ingalls Shipbuilding*, 53 F.3d 723, 727-28 (5th Cir. 1995) (employer removed welder with injured arm from positions requiring climbing, but continued to employ for other welding jobs); *Sherrod v. American Airlines, Inc.*, 132 F.3d 1112, 1121 (5th Cir. 1998) ("American attempted to place Sherrod in other positions for which American did not deem her disqualified due to her back condition."). Rather, United imposes a blanket prohibition covering not just one position, or a particular subcategory, but all of its jobs within the relevant class. *Compare Coleman v. Southern Pac. Transp. Co.*, 997 F. Supp. 1197, 1204-06 (D. Ariz. 1998) (holding that defendant regarded plaintiff as disabled, where it barred him from any of its locomotive transportation positions due to perceived safety risks from his monocular vision).

United argues that it does not regard Pilots as substantially limited in the ability to work within the relevant class of jobs, even though it disqualified them from every position it offers within that class. Pilots can conceive of only one

circumstance in which an employer might arguably be able to advance this position – where all of the employer's job openings are distinguishable from jobs in the same class offered by other employers. *See, e.g., Forrisi v. Bowen*, 794 F.2d 931, 935 (4th Cir. 1986) (holding acrophobic utility systems repairer not disabled, where he was able to work for other employers, but was unable to work for one employer whose plant required work at particularly high altitudes).[40] For example, in *Baulos v. Roadway Express, Inc.*, 139 F.3d 1147 (7th Cir. 1998), the defendant regarded plaintiffs as unable to drive sleeper trucks, but not other types of trucks in its fleet. If defendant's entire fleet had been composed of *only* sleeper trucks, and defendant had thus rejected plaintiffs for all of its positions, it might still have argued that it did not regard plaintiffs as unfit to perform all jobs within the class. The defendant would have no such defense, however, if it disqualified plaintiffs from both types of driving positions. *See Best v. Shell Oil Co.*, 107 F.3d 544, 548 (7th Cir. 1997) (finding genuine issue of fact whether employer regarded driver with injured knee as disabled where it denied him any truck driving positions).

The Court today need not decide the validity of such an argument. Pilots have expressly alleged that there is *not* anything unique about United's pilot positions that distinguishes them from positions at other airlines. *Id.*

In affirming dismissal of Pilots' action, the lower court implicitly assumed this allegation to be untrue. The court described United's piloting positions as "a particular specialized job or a narrow range of jobs." J.A. 72 (quoting 29

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[40] The EEOC has essentially adopted this view, instructing its investigators that, where an employer applies a disqualifying criterion such as a vision requirement, the investigator should determine whether the criterion pertains uniquely to a peculiar job or work site of that particular employer, or pertains to a class of jobs. EEOC Order No. 915.002, 2 Compliance Manual, § 902-51 to -52 (1997). In the latter circumstance, the employer regards those who do not qualify as substantially limited in working. *Id.* at 902-52.

C.F.R. § 1630, App. § 1630.2(j), at 349 (1998)). This remarkable factual conclusion is entirely at odds with Pilots' allegation that United's positions are indistinguishable from those of other airlines.[41] The court attempted to justify its conclusion by quoting the EEOC example that "an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be a commercial airline co-pilot or a pilot for a courier service, would not be substantially limited in the major life activity of working." *Id.* This example, however, cuts directly *against* the lower court's conclusion. United employs a great host of pilots to serve as both pilots and co-pilots, on both passenger routes and courier routes, and it has barred Petitioners from filling *any* of those positions. Of course, another employer might hire Pilots for one of those positions, but that is irrelevant to United's perception that Pilots are unfit for any piloting position.[42] Whatever another employer might believe, United regards Pilots as substantially limited in the major life activity of working,

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[41] The lower court borrowed the phrase "global airline pilot" from Pilots' complaint, and described this as too narrow to constitute a class of jobs. J.A. 71. This was merely a descriptive phrase, however, reminding the court that United is a global airline, whose pilots garner more prestige and higher pay than has ever been available to Petitioners. The phrase cannot fairly be read to suggest that the requirements of United's positions are in any way distinguishable from those of other airlines. Pilots expressly alleged to the contrary.

[42] The lower court's confusion may be attributable to the fact that the EEOC's example was given in the context of the actually disabled prong, rather than the "regarded as" prong. It is, by any account, a peculiar choice of examples. The FAA imposes the same vision requirements on all commercial pilots, whether acting as pilots or co-pilots, on passenger routes or courier routes. 14 C.F.R. §§ 67.103, 67.203 (1998). Pilots are not aware of any airline that makes a distinction between the vision requirements of any of these positions. As they have alleged, United certainly does not.

because it perceives Pilots' poor uncorrected vision "to foreclose generally the type of employment involved." *Forrisi v. Bowen*, 794 F.2d at 935.[43]

Even if it were not directly at odds with Pilots' factual allegations, the lower court's distinction between United's positions and those of other airlines is nonsensical. United contends that to allow Pilots to fly its aircraft would be a direct threat to the safety of its passengers. In the face of this argument, it cannot credibly claim that it believes Pilots are nevertheless qualified to fly for United's competitors. This is akin to the school board in *Arline* arguing that it did not want plaintiff infecting the children in its district but had no objection to plaintiff infecting children in another district. It is doubtful that such a bizarre argument could ever prevail; it surely cannot support dismissal of a claim at the pleadings stage.

Pilots are at a loss as to what more they could allege to support a claim that United regarded them as substantially limited in working within a class of jobs. They have alleged that United has judged them unfit for the occupation for which they have trained, based upon nothing but unfounded stereotype. The decision below thus "permit[s] the precise evil that [the "regarded as" prong] was designed to eliminate." *United States v. Board of Comm'rs of Sheffield, Ala.*, 435 U.S. 110, 124 (1978). Unless this aspect of the ADA is to be a dead letter, this Court should reverse the dismissal of their claim under the "regarded as" provision.

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[43] Indeed, because United based its decision solely on Pilots' uncorrected vision, the Court may infer that United regarded Pilots as disabled for *any* type of employment requiring uncorrected vision in either eye better than 20/200. *See Sicard*, 950 F. Supp. at 1430 (observing that the defendant perceived its employees' uncorrected vision as central to their ability to perform work, and few jobs can be performed with 20/200 vision).

CONCLUSION

United rejected Pilots' applications for employment because Pilots are disabled or because United regards them as disabled. Pilots' allegations thus state a prima facie case under the ADA. Of course, this does not mean they are necessarily entitled to relief. United will have the opportunity to meet its burden of showing a direct threat to safety, or some other defense. *See McDonnell Douglas Corp v. Green*, 411 U.S. 792, 802 (1973) (once a prima facie case of discrimination is established, the burden shifts to the employer to demonstrate a nondiscriminatory justification). As it did in both *Arline* and *Bragdon*, the Court should remand this case for consideration of the direct threat issue.

Respectfully submitted this 22nd day of February, 1999.

VAN AARON HUGHES
Counsel of Record for Petitioners
TUCKER K. TRAUTMAN
KRISTIN L. WETENKAMP
IRELAND, STAPLETON, PRYOR & PASCOE, P.C.
1675 Broadway, Suite 2600
Denver, Colorado 80202
Telephone: (303) 623-2700

SHAWN D. MITCHELL
12530 Newton Street
Broomfield, Colorado 80202
Telephone: (303) 464-9409

Attorneys for Petitioners